United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2009

To Be Argued By
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 76-2009

VINCENT CAPUTO,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA ex rel Vincent Caputo,
Relator-Appellant

- against -

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,
Respondent-Appellee

AFFIDAVIT OF SERVICE BY MAIL

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Donna M. Naegeli, being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above named defendant, Vincent Caputo, herein. That she is over 18 years of age, and resides at Mineola, New York. That she served the within Brief and Appendix on the 5th day of March, 1976 upon

Louis Lefkowitz
Attorney General for the State of New York
Two World Trade Center
New York, New York 10047

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Donna M. Naegeli

Sworn to before me this
5th day of March, 1976

Lorraine C. Papas

LORRAINE C. PAPAS
Notary Public, State of New York
No. 30-4501796
Qualified in Nassau County
Certificate filed in Nassau County
Commission Expires March 30, 1977

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from an order of the United States District Court for the Eastern District of New York (Weinstein, J.) entered December 22, 1975 denying, after a hearing, petitioner-appellant's application for a writ of habeas corpus. A certificate of probable cause was granted by the District Court on January 22, 1976.

Questions Presented

Was the finding of the District Court that petitioner would have pleaded guilty no matter what the Court told him about sentencing alternatives correct?

Was the District Court's finding dispositive of petitioner's contentions?

Facts and Prior Proceedings

Petitioner is presently incarcerated in the Woodbourne Correctional Facility, Woodbourne, New York pursuant to (1) a judgment of conviction of the Supreme Court, Queens County (Brennan, J.) entered on May 7, 1975 for attempted burglary in the third degree and for which petitioner was sentenced to a term of imprisonment of one year six months to three years and (2) a judgment of conviction of the County Court of Nassau County (Young, J.) entered on November 20, 1972, after a plea of guilty to attempted burglary in the third degree and for which petitioner was sentenced to an indeterminate term of four years. It is this second conviction which petitioner is challenging here.

This conviction was affirmed by the Appellate Division, 44 A D 2d 572 (2d Dept., 1974) (Shapiro, J. dissenting) and the Court of Appeals, 36 N Y 2d 653 (1975).

A motion to vacate judgment was denied by the County Court of Nassau County (Young, J.) by order dated June 10, 1975 (A. 4).* Leave to appeal to the Appellate Division, Second Department was denied by Justice Shapiro on July 16, 1975.

The Crime

On July 26, 1972, petitioner and an accomplice burglarized a house in Malverne, Long Island and criminally possessed an automobile. Petitioner was arrested in the yard outside of the house (A. 31).

On September 26, 1972, petitioner gave a statement to two detectives, admitting that he had broken into the house (A. 30). The voluntariness of the statement has never been

*Page references preceded by "A" refer to "Appendix for relator-appellant."

contested. Two days later, petitioner was indicted for the crimes of burglary, third degree; criminal possession of stolen property, second degree and possession of burglar's tools.

The Plea and Sentencing

On October 11, 1972, petitioner pleaded guilty to the crime of attempted burglary, third degree, in satisfaction of the indictment.

The Court session began with the Assistant District Attorney stating in part (A. 9-10):

> "Pursuant to a conference held earlier this afternoon, between defense counsel Mr. Wershals, your law secretary, Mr. Gittleman, and myself, the People at this time would ask your Honor to allow this defendant to withdraw his previously entered plea of not guilty to this indictment and enter instead a plea of guilty under the first count of the indictment, to attempted burglary in the third degree, a Class E felony, in satisfaction of the indictment.
>
> "No promises or representations have been made as to what your Honor will do with regard to sentence, and nothing has been done to induce the defendant into taking this plea."

After considering all the elements of the crime to which the petitioner was pleading, the Court stated to the petitioner (A. 13):

> "THE COURT: And you are not arguing or contesting the fact that you are guilty, at least of an attempted burglary?
>
> "THE DEFENDANT: No.
>
> "THE COURT: You are admitting it, in other words?
>
> "THE DEFENDANT: Yes."

It was then that the Court first mentioned sentencing possibilities to the petitioner.

In a sworn affidavit attached to the petition below as Exhibit D, petitioner's attorney at the plea and sentencing swore:

> "3. Prior to defendant's entry of a guilty plea to attempted burglary in the third degree, I informed the defendant that in my opinion the Court would impose an indeterminate sentence with a maximum of three or four years."

At sentence, not only did petitioner and his attorney make no comment or express dismay at the sentence, but his attorney, before sentence was imposed, requested the Court to commit the petitioner pursuant to § 207 of the New York Mental Hygiene Law, a commitment that could have resulted in a commitment of petitioner of up to 5 years, longer than the sentence he did receive (A. 22).

In response to petitioner's motion to vacate judgment on the ground that his plea was not entered voluntarily and intelligently, and after considering the minutes of the change of plea and sentence and the affidavits of petitioner and petitioner's attorney at the plea and sentence, Judge Young found that the full range of sentences mentioned to petitioner at the time his plea was entered were open to petitioner at that time since he had neither been adjudicated an addict nor admitted that he was an addict. The Court found further that the various sentencing possibilities were not narrowed until sentencing when petitioner actually admitted his addiction. Thus, "it was the waiver of an addiction hearing and not the guilty

plea which deprived the defendant of the sentence options." (A. 7)

The Hearing in the District Court

At the hearing, the petitioner admitted that before he entered his plea, his attorney told him that if he pleaded guilty, he would be subject to a possible sentence of up to four years (A. 29-30). Petitioner admitted that he had confessed to the crime and that he was caught in the yard of the house he was accused of burglarizing (A. 30-31).

Petitioner faced a maximum sentence of seven years (A. 31, 49). Petitioner had a history of eighteen arrests, two prior jail sentences (A. 32) and a prior forty month commitment to the Narcotics Addiction Control Commission (A. 33)(hereinafter NACC).

Petitioner testified that although he had a doubt about pleading guilty until he did so, he had discussed pleading guilty with his attorney before entering the Courtroom and had essentially decided to do so (A. 35-36).

Petitioner's attorney at plea testified that before pleading he told petitioner that he could get up to four years (A. 30). He did not recall if he told him that he could get a lesser sentence (A. 30). He then testified that he told petitioner that in his opinion the Court would impose an indeterminate sentence with a maximum of three or four years (A. 40). He also stated that the evidence against his client was overwhelming (A. 40), that had he gone to trial, there was a good chance of conviction (A. 49-50), and that had the choice been between going to trial with a chance of being sentenced up to seven years or being committed to NACC and pleading guilty with a maximum sentence possibility of four years or a commitment to NACC, his client would have pleaded guilty (A. 50).

The Court then found (A. 50):

> "I think based on what I have heard that would have been the answer. I don't really believe there was any substantial error here. The error would not have affected the result at all. I can't grant on that, given the facts here.

"I find on the basis of the evidence before me that the defendant would have pleaded in any event exactly as he did, whatever the judge told him about alternative. The error of the Court, therefore, in proposing alternatives that were not in fact available had no impact at all on the plea."

ARGUMENT

THE FINDING OF THE DISTRICT COURT THAT PETITIONER WOULD HAVE PLEADED GUILTY NO MATTER WHAT THE COURT TOLD HIM ABOUT SENTENCING ALTERNATIVE WAS CORRECT AND IS DISPOSITIVE OF PETITIONER'S CONTENTIONS.

Where a defendant has been provided erroneous or incomplete sentencing information, this Court has consistently indicated that before his guilty plea can be considered involuntarily and unintelligently entered he must demonstrate that he relied on that misinformation. Indeed, no act may be defined as involuntary or unintelligent where the actor has not made the misinformation a significant or important reason for performing the act.

In United States ex rel. Hill v. Ternullo, 510 F. 2d 844 (2d Cir., 1975), where the defendant was given positive misinformation about the minimum sentence for which he was eligible, this Court stated (510 F. 2d at 847):

> "In the case under review, there is evidence that the defendant's plea, like Leeson's [United States ex rel. Leeson v. Damon, 496 F. 2d 718 (2d Cir., 1974)] was made with reliance on erroneous legal advice about the ultimately knowable .... Misinformation about a statutory minimum is no less demonstrative of counsel's incompetence, nor necessarily less significant to a defendant's decision to plead guilty, than an error about a statutory maximum." (Emphasis supplied)*

In United States v. Podell, 519 F. 2d 144 (2d Cir.) cert. den. ___ U.S. ___, 44 USLW 3263 (Nov. 3, 1975), where the defendant alleged that he pleaded guilty on the prosecutor's assurance that he would not recommend a jail sentence and that he would testify on the defendant's behalf at a disbarment proceeding, the District Court found that the prosecutor had violated the spirit if not the letter of

*This was the bulk of the language quoted from Hill in United States ex rel. Rosner v. Warden, 520 F. 2d 1206 (2d Cir. 1975) when this Court instructed the District Court and remanded for an evidentiary hearing.

years. There was no comment from the defendant or his counsel.

the prosecutor's representation, but that the defendant in deciding to plead guilty had not relied in any significant degree on the government's representations. This Court upheld the District Court's finding and reiterated the standard that a plea to be held involuntary must rest in a significant degree on the broken promise.

In Kelleher v. Henderson, ___ F. 2d ___, Docket No. 75-2137, Slip Op. No. 560, p. 2007 (Feb. 18, 1976), where the defendant was not informed of what maximum and minimum sentences he would be liable for if he pleaded guilty, the Court stated that there was "no indication at all that appellant would have acted differently if he had been told of the possibility of a 25-year sentence." At 2015-2016.

Kelleher, supra relied on Jones v. United States, 440 F. 2d 466 (2d Cir. 1971); United States v. Welton, 459 F. 2d 824 (2d Cir.) cert. denied 404 U.S. 859 (1971) and Serrano v. United States, 442 F. 2d 923 (2d Cir.) cert. denied 404 U.S. 844 (1971) for the proposition that the defendant must demonstrate reliance on information about sentencing before his

plea may be vacated. Kelleher holds that knowledge about sentencing is not constitutionally required and that the issue reaches constitutional proportions only where the defendant can demonstrate reliance.

The District Court's finding that petitioner "would have pleaded in any event exactly as he did, whatever the judge told him about alternatives" and that the information given "him had no impact at all on the plea" (A. 50) was not clearly erroneous. It was, as this Court noted in United States ex rel. Sostre v. Festa, 513 F. 2d 1313, 1319 (2d Cir. 1975), the "experienced jurist" below who "personally ... estimate[d] the credibility of the witnesses who appeared before him."

Petitioner admitted that his attorney told him that if he pleaded guilty he would be subject to a possible sentence of up to four years (A. 29-30). He admitted that he had confessed and that he was caught in the yard of the house he later admitted he burglarized (A. 30-31). He admitted a long history of arrests and convictions (A. 32-33). He virtually admitted that he had decided to plead guilty before entering the Courtroom (A. 35-36), the only place it was even asserted that he received misinformation about sentencing alternatives.

His attorney at plea testified that he told him that he could get up to four years (A. 38), that he could not recall if he told him that he could get a lesser sentence (A. 38)*, that in his opinion the Court would impose an indeterminate sentence with a maximum of three or four years (A. 40), that the evidence against his client was overwhelming (A. 49), that had his client gone to trial there was a good chance of conviction (A. 49-50) and that had the choice been between trial with a possible maximum of seven or a plea with a maximum of four, his client would have taken the plea (A. 50).

Although all the above was quickly recalled by his attorney, he could not recall whether he ever told petitioner that he could get a shorter sentence (A. 38) or whether he went into the Courtroom on the day the plea was entered with the intention that his client would plead guilty (A. 40-41).

*In his affidavit in support of petitioner's application for a writ of habeas corpus, Exhibit "D" to the petition, this same attorney stated in par. 3 that he told the defendant-petitioner that in his opinion the Court would impose a maximum of three or four years. He carefully avoided stating in the affidavit, as at the hearing, that he told petitioner that he could get a shorter sentence. The plea minutes (A. 8-18) demonstrate that petitioner was determined to plead guilty before he went into Judge Young's courtroom before Judge Young provided him with the alleged misinformation, the only source petitioner was able to demonstrate of the alleged misinformation.

Petitioner's attorney did admit that at sentencing before sentence was entered, he requested the Court to impose a commitment to a narcotics program which could have incarcerated petitioner for up to 60 months (A. 44).

Petitioner clearly decided to plead guilty before the alleged misinformation was given to him. He provided no evidence that he was told he could receive a sentence of probation, conditional discharge or one year in a county jail before he walked into the Courtroom knowing that in all probability he was going to plead guilty. The testimony at the hearing below demonstrate that he did not rely on the alleged misinformation. Without that reliance, petitioner has not demonstrated error of constitutional proportions.

CONCLUSION

THE ORDER THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
March 30, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID L. BIRCH
Assistant Attorney General
Of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 31ST day of March , 1976 , she served the annexed upon the following named person :

JAMES J. McDONOUGH
Attorney In Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York 11501
Att: Allen M. Kranz, Esq.

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D. Chieco

Sworn to before me this
31ST day of March , 1976

David G Bury

Assistant Attorney General
of the State of New York